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CRIMINAL LAW ISSUES

CONRAD v. STATE, No. 57A03-0009-CR-331, ___ N.E.2d ___ (Ind. Ct. App. Apr. 30, 2001).
BARNES, J.

We find one issue to be dispositive: whether our supreme court's decision in Ross v. State, 729 N.E.2d 113 (Ind. 2000), should effectively preclude enhancement under the "general" habitual offender statute of Conrad's sentence for unlawful possession of a firearm by a serious violent felon. Although Ross interprets a different statute and is not directly on point, we hold that Conrad's sentence was improperly enhanced.

. . . .

[O]ne obviously can be convicted of the crime of unlawful possession of a firearm by a serious violent felon only if it is proven the defendant has previously been convicted of a serious violent felony; otherwise, there is no crime. Therefore, the defendant's serious violent felon status does not serve to "enhance" a sentence in the traditional sense of the word. As a practical matter, though, the defendant's serious violent status does realistically serve as an "enhancement" in that it increases the potential punishment for "possession of a firearm" from nothing at all to six to twenty years imprisonment and a fine of up to $10,000, the sentencing range for a class B felony. [Citation omitted.] Nor can the serious violent felon statute be considered a "specific" habitual offender or anti-recidivist statute because it does not provide for progressively more severe penalties for repeated infractions of that or other related statutes. However, after Ross it would appear this is no longer by itself an adequate basis for holding that a defendant's sentence may be enhanced under the general habitual offender statute.

We believe, in light of Ross, that we are faced with an ambiguity in potential punishments as between the specific serious violent felon statute and the general habitual offender statute that must be resolved against the penalty. . . .

. . . .

BROOK, J., concurred.
BAKER, J., filed a separate written opinion in which he dissented.

SMITH v. STATE, No. 29A02-0010-PC-640, ___ N.E.2d ___ (Ind. Ct. App. Apr. 30, 2001).
BROOK, J.

The facts most favorable to the convictions indicate that on October 18, 1996, while in the Hamilton County home of his then-grandparents-in-law, Horace ("Horace") and Virginia Harvey, Smith stole a book of checks from under Horace's bed. The checking account was held in trust for Horace's sister at NBD Bank ("NBD"), with Horace as trustee. Later that day, Smith deposited six of the checks totaling over $17,000 in his Bank One account at six

Bank One branches in Marion County; all six checks were made payable to and endorsed by "Dave Smith" and were signed in Horace's name.

. . . .

[S]mith signed a written agreement wherein he pleaded guilty to all theft and forgery charges . . . . Sentencing was left to the discretion of the trial court, "with a cap of executed time of twenty years." . . . Without mentioning Indiana Code Section 35-50-1-2(b) or –(c), [footnote omitted] the court asked whether Smith understood that "these are separate offenses," to which he responded, "Yes." . . .

At the sentencing hearing on March 27, 1997, Sirk orally moved [footnote omitted] to withdraw his client's guilty plea, claiming that Smith had not understood the consequences of waiving venue and conceding that his crimes were separate offenses for sentencing purposes under Indiana Code Section 35-50-1-2. . . . After listening to the tape recording of the guilty plea hearing, the trial court denied the motion, sentenced Smith to twenty years, [footnote omitted] and ordered restitution in the amount of $17,210.

On April 23, 1997, Smith filed a pro se petition for post-conviction relief, asserting that his guilty plea "was made on a not voluntary basis" and that he "was not advised nor had knowledge of that by waiving venue and agreeing that each of these acts were separate acts he was waiving his right under Indiana Code 35-50-1-2 to receive a maximum sentence of ten (10) years presumptive of the next highest class of offense." . . .

. . . .

[S]mith asserts that his guilty plea to six separate theft counts lacked an adequate factual basis because his purloining of the checks constituted only a single act of larceny. [Citation omitted.] The single larceny rule applies when "several articles of property are taken at the same time, from the same place, belonging to the same person or to several persons." *Raines v. State*, 514 N.E.2d 298, 300 (Ind. 1987). "The rationale behind this rule is that the taking of several articles at the same time from the same place is pursuant to a single intent and design." [Citations omitted.] [Footnote omitted.] The State had discretion to charge Smith with six theft counts, but he should not have been convicted and sentenced on more than one count. [Citation omitted.]

Smith further claims that Sirk's failure to advise him of the single larceny rule rendered his guilty plea involuntary and unintelligent. . . . [I]t is obvious that Smith's guilty plea was at least unintelligent, if not involuntary, with respect to the six counts of theft. . . .

. . . [S]mith claimed that Sirk failed to advise him that his offenses might have constituted an episode of criminal conduct. Indiana Code Section 35-50-1-2(b) defines "episode of criminal conduct" as "offenses or a connected series of offenses that are closely related in time, place, and circumstance." "[E]xcept for crimes of violence, the total of the consecutive terms of imprisonment … to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the presumptive sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted." IND. CODE § 35-50-1-2(c). Assuming, *arguendo*, that Smith's offenses constituted an episode of criminal conduct, the trial court could have sentenced him to a maximum of ten years, the presumptive sentence for a Class B felony. [Citation omitted.]

In *Tedlock v. State*, 656 N.E.2d 273, 276 (Ind. Ct. App. 1995), a panel of this court referred to cases from other jurisdictions in construing the definition of "episode" as used by the legislature in its 1994 amendment of Indiana Code Section 35-50-1-2:

> In *State v. Ferraro* (1990), 8 Haw.App. 284, 800 P.2d 623, the Hawaii Court of Appeals defined "episode" quite similarly to the definition adopted by our legislature as follows:
>
> > 'the singleness of a criminal episode should be based on whether the alleged conduct was so closely related in time, place and circumstances

> that a complete account of one charge cannot be related without referring to details of the other charge.' [Citation omitted.] . . .
>
> . . . .
>
> Although a complete account of Smith's theft of the checks and each of the forgeries could arguably "be related without referring to details of the other charge[s]" under *Tedlock*, in limiting our application of the facts to the *plain language* of Indiana Code Section 35-50-1-2(b), we conclude that the "time, place, and circumstance" of this "connected series of offenses" are so closely related as to constitute an episode of criminal conduct and that the post-conviction court erred in determining otherwise. . . .
>
> . . . .

BARNES, J., filed a separate written opinion in which he concurred in part and in which he dissented in part as follows:

> [I] do not agree that this factual scenario necessarily falls within the ambit of Indiana Code Section 35-50-1-2(b) and (c). The majority admits that a complete account of the separate forgeries and deposits into the same account could "arguably" be related without referring to the details of the other charges. That does not, in my opinion, satisfy the mandate of the "episode of criminal conduct" statute nor Tedlock v. State and the other cases cited by the majority, which I believe stated the correct rule: that multiple crimes do not constitute an "episode of criminal conduct" if a complete account of each offense can be related without referring to details of another. [Citation omitted.] . . .

BAKER, J., filed a separate written opinion in which he concurred in part and in which he dissented in part, as follows:

> I fully concur with the majority's resolution of the laches issue and Judge Brook's conclusion that the time, place, and circumstance of this connected series of offenses are so closely related as to constitute one "episode" of criminal conduct. . . .
>
> I cannot agree with the majority, . . . that Smith has sufficiently demonstrated a showing of prejudice that commands the conclusion that his guilty plea was involuntary.
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> . . . .

WILCOX v. STATE, No. 49A02-0008-CR-537, ___ N.E.2d ___ (Ind. Ct. App. Apr. 30, 2001). BAILEY, J.

> Wilcox agreed that, as a condition of her release upon bail prior to trial, she would have no contact with Woodard or Mulholland. . . .
>
> [W]ilcox allegedly confronted Woodard and struck him with an object and argued with Mulholland in violation of the standing no contact order. Based upon this incident, the State . . . charged Wilcox with Battery as a Class B misdemeanor and with Invasion of Privacy, a Class B misdemeanor [footnote omitted] . . . . Additionally, . . . the State sought pursuant to Indiana Code section 35-33-8-5(d) to revoke the original bond Wilcox posted for the arrest . . . . . [T]he court ruled that Wilcox had violated the no contact order by failing to leave Woodard's apartment when she saw Mulholland, and by attacking Woodard. The court went on to rule that Wilcox would be "sentenced" to a total of ten days for the violation. The court gave her five days of credit for time served and released her that day. The court then reinstated Wilcox's bond. . . .
>
> [W]ilcox filed her Motion to Dismiss the April 12, 2000 Battery and Invasion of Privacy charges, claiming that prosecution for these offenses would violate the Double Jeopardy clauses of both the federal and Indiana constitutions because she had already been subjected to jeopardy for the same matters during the bond revocation proceedings. [Footnote omitted.] . . .

. . . The issue before us, whether principles of double jeopardy preclude the use of the same facts to support both the revocation of a pre-trial release bond and a subsequent criminal prosecution, is a pure question of law. . . .

. . . .

[T]here is no indication from the face of the bail revocation statute that the General Assembly intended for the revocation of a defendant's bond to constitute a criminal punishment. . . .

[T]he statute does not impose the traditional "beyond a reasonable doubt" standard governing criminal proceedings. . . .

. . . .

. . . [W]e cannot conclude that what the legislature apparently intended as a civil remedy is in actuality a criminal penalty. . . .

[T]here appears to be no basis upon which to conclude that revocation of bail for reasons such as those set forth in Indiana's statute has historically been regarded as a criminal punishment. . . .

. . . .

[I]t is reasonable to suspect that the threat of bail revocation may serve as a deterrent to the kinds of behavior identified in the statute, some of which may also constitute crimes. This of course is a traditional goal of criminal punishment. Nevertheless, the mere existence of a deterrent purpose "is insufficient to render a sanction criminal, as deterrence 'may serve civil as well as criminal goals.'" [Citations omitted.] . . .

In sum, we conclude that the General Assembly intended bail revocation to constitute a civil sanction, and we have not found the "clearest proof" that the sanction is so punitive in purpose or effect that the sanction is in reality criminal punishment. Thus, Wilcox was not put in constitutional jeopardy as a result of the bail revocation proceedings, and her pending prosecution for the conduct giving rise to the revocation of her bail is not barred by double jeopardy principles.

. . . .

BAKER and MATHIAS, JJ., concurred.

DAVIS v. STATE, No. 21A01-0008-CR-256, ___ N.E.2d ___ (Ind. Ct. App. May 2, 2001).
BAKER, J.

In Steward [v. State, 636 N.E.2d 143 (Ind. Ct. App. 1994), affirmed, 652 N.E.2d 490 (Ind. 1995)], the victim accused four other men, apart from the defendant, of molesting her around the same time that she had made accusations against the defendant. Thus, there was a substantial question as to the identity of the perpetrator. Inasmuch as the State offered evidence that the complaining witness's behavior was consistent with a child who had been molested and also that her behavior improved after she accused the defendant of the molesting, we determined that the jury should also have been informed that the complaining witness accused four others of molesting her around the same time that the defendant had allegedly assaulted her. Id. at 150. Thus, we concluded it was error to permit the State to present corroborating evidence linking the defendant to the act of molestation, while precluding the defendant from presenting exculpatory evidence concerning the accusations of prior molestations by men other than the defendant. Id.

Here, the State commented on L.P.'s prior sexual activity in its opening statement. L.P.'s grandmother testified that the doctor informed her on the night of the examination that L.P. had been sexually active. During the offer of proof, L.P. admitted having sex with another individual sometime in 1996. She acknowledged that this incident occurred before the hospital examination had been performed. R. at 233-34. Thus, while L.P. accused Davis of having sex with her, the jury was precluded from hearing that L.P. was having sex with others at age twelve. Such exclusion unfairly bolstered her testimony, inasmuch as the inference arises that, because L.P. was accurate in stating that sexual contact had

occurred, as disclosed by the physical examination, she also must have been accurate in stating that Davis was the perpetrator of the charged offenses. This is the type of erroneous inference that we sought to prevent from occurring under our holding in Steward. We therefore reject the State's argument that this case differs from the circumstances that were presented in Steward. In this case, as well as in Steward, it was apparent that there could have been another possible source for the acts of molestation.

Without permitting Davis to introduce such exculpatory evidence, the only reasonable inference that the jury could have drawn from the evidence presented, was that Davis was the perpetrator and that L.P.'s accusations were true, because reasonable jurors would not think it typical that a twelve-year-old was sexually active. Thus, we are compelled to conclude under these circumstances that the trial court abused its discretion in excluding this evidence from the jury. As a result, Davis's convictions may not stand.

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SHARPNACK, C. J., and MATHIAS, J., concurred.

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